Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TERRY P. PLESCHER,

Petitioner,

v.

RICHARD WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office; RONALD T. MATTINO, JR.; EDWARD F. HIMMELSBACH; GLEN M. GARFIELD and DAVID M. GRANT individually and in their official capacities as Deputies Sheriff of the PALM BEACH COUNTY SHERIFF'S OFFICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit's Affirmance of the District Court's Decision Vacating the Default Conflicts with the Decisions of the First Circuit, the Third Circuit, the Fourth Circuit, and the Fifth Circuit Which Hold that a Default Can Only Be Vacated Upon Good Cause, and Only if Done Within a Reasonable Time, Warranting Review by This Court.

2. Whether the Improper Admission of Collateral Source Benefits Violates this Court's Ruling in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (*per curiam*), *rehearing denied*, 375 U.S. 936 (1963) Which Prohibit the Introduction of Collateral Source Benefits as Inherently Prejudicial, Warranting Review by This Court.

3. Whether the Eleventh Circuit's Decision Allowing the Admission of Collateral Source Benefits Conflicts With the Decisions of the Second, Fifth, Sixth, Eighth and Tenth Circuits Which Prohibit the Introduction of Collateral Source Evidence, Warranting Review by This Court.

4. Whether the Eleventh Circuit's *Per Curiam* Affirming the Admission of Evidence of the Plaintiff's Blood Alcohol Content Conflicts with the Decision of Every Other Circuit Considering the Issue, Warranting Review.

5. Whether the Eleventh Circuit's Decision Imposes An Impermissible Pleading Standard in cases under 42 U.S.C. §1983, and Conflicts with This Court's Decision in *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S.Ct. 1160 (1993), Warranting Review.

6. Whether the Decision of the Eleventh Circuit, Affirming the Directed Verdict in Favor of Grant, is Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this cause on June 10, 1996.

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the Eleventh Circuit is not reported. This opinion is printed in the appendix (A-1 through A-2) to this petition. The United States District Court for the Southern District of Florida issued did not issue a written opinion in this case. A copy of the order of the district court, denying the Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, is printed in the Appendix (A-3 through A-4) to this petition. The order by the district court, entering final judgment, is printed in the Appendix (A-5 through A-6) to this petition.

JURISDICTION OF THIS COURT

The Eleventh Circuit Court of Appeals issued its opinion in this matter on June 10, 1996. No petition for a rehearing was filed in this matter. This petition was filed within 90 days after the entry of the Eleventh Circuit's decision in this matter. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. AMEND. IV provides

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case concerns four important issues: the uniform application of the Federal Rules of Civil Procedure, the abrogation of the collateral source rule, the introduction of prejudicial evidence of intoxication and the standard for pleadings and directed verdicts.

The Procedural History of this Case, leading to the Entry of Default.

This case started out in state court for Palm Beach County, Florida. The Plaintiffs Terry Plescher, and his wife, Jill Plescher, sought relief against a number of Defendants, all sheriff's deputies for Palm Beach County, for violations of Terry Plescher's constitutional rights, and for state-law claims of assault, battery and negligence.

The Defendants removed the action to the United States District Court for the Southern District of Florida. (R.1). The Plaintiff originally brought this action in the Circuit Court of Palm Beach County, Florida, seeking recovery under 42 U.S.C. §1983 and state law claims. The Defendants then removed this case from state court to federal court, the United States District Court for the Southern District of Florida, pursuant to the Federal Removal Statute, 28 U.S.C. §1441. (R.1.). Removal jurisdiction was based upon 28

U.S.C. §1441(b), as the original complaint alleged violations of 42 U.S.C. §1983.

On September 16, 1994, the district court granted the Plaintiffs leave to file an amended complaint. (R.90). Terry Plescher filed an amended complaint on October 20, 1994. (R.93). The clerk's docket entry for the filing of the amended complaint indicated that the Defendants' answer to the amended complaint was due on October 31, 1994. (R.93).

Although the docket entry required the Defendants to file an answer to the amended complaint by October 31, 1995, no answer was filed by the Defendants within that time period. Accordingly, on November 18, 1994, the Plaintiff moved for a default against all Defendants. (R.98). The Defendants responded to that motion on November 21, 1994, (R.100), and tendered an answer on November 21, 1994. (R.99). The Defendants did not seek leave of court to file that answer, which was untimely. The clerk then entered a default against all Defendants. (R.102).

On February 27, 1995, the district court set the matter for trial at a special trial setting. (R.121). Trial was set for March 6, 1995. (R.121). On March 2, 1995, the Plaintiff moved the district court to limit the presentation of evidence to the issues of damages, based upon the earlier-entered default. (R.122). The Defendants did not respond to that motion. On the first day of trial, the district court asked the Defendants about this default. (Tr.2). The Defendants admitted to the district court that they did not take any action to vacate the default. (Tr.4). The Defendants attempted to excuse their conduct on the grounds that they did not believe that the clerk's entry of November 21, 1994, was a default, (Tr.4). The district court rejected the Defendants' characterization of the November 21, 1994 order, and ruled that it was a default. (Tr.4). Without hearing any response from the Defendants other than their statement that they had not taken any action, the district court vacated the default. (Tr.5).

The Motions in Limine.

Prior to trial, the Plaintiff filed a number of motions in limine. Two are relevant to this appeal. The first motion asked the district court to bar any evidence of the Plaintiff's blood-alcohol content.

(R.138). The district court denied that motion. (Tr.17). The second motion asked the district court to bar the introduction of evidence of benefits received by the Plaintiff from any collateral source. (R.118). In that motion, the Plaintiff stated that this evidence would be inadmissible at trial. (R.118). When the Plaintiff presented that motion, the Defendants argued that the fact that the Plaintiff's disability was caused by a prior injury was relevant to damages. (Tr.20). The Plaintiff agreed that while the fact of the previous injury may come in, any benefits received from the workers' compensation settlement should be excluded under the collateral source rule. (Tr.20). When the Plaintiff said that only the money should be excluded, the Defendants said "[t]hat's fine." (Tr. 21).

The agreement by the Defendants not to introduce the workers' compensation benefits did not last long.

The Presentation of the Evidence.

This case tested the credibility of the Plaintiff against the credibility of the Defendants. The Plaintiff claimed that the Defendants intentionally broke his leg. The Defendants denied it.

Surprisingly, most of the facts leading up to the Plaintiff's broken leg were not in dispute. Four Palm Beach County Sheriff's deputies responded to a radio call concerning a battery and shooting in the Drexel-Okeechobee area of West Palm Beach County in the late evening of July 29, 1990. (Tr.120-121). At the scene, the Plaintiff was arrested and handcuffed. (Tr. 139-140).

After the Plaintiff was handcuffed, he began to complain of back pain. (Tr.143). The Defendants decided to take the Plaintiff to a hospital to obtain a medical clearance. (Tr.124).

Because the Plaintiff was complaining of back injuries, Grant, Garfield and Mattino decided to call for a van to transport the Plaintiff to the hospital. Defendant Edward Himmelsbach was driving the van that night. (Tr.126). Himmelsbach drove the Plaintiff to Humana Hospital, the designated medical care facility for prisoners under a contract with the Palm Beach County Sheriff's office. (Tr.155). Mattino followed Himmelsbach to Humana Hospital. (Tr.156-157).

When Mattino and Himmelsbach arrived at Humana Hospital, they took the Plaintiff out of the van, assisted by Evilio Santiago, an emergency room technician. (Tr.456). During the time that the Plaintiff was first at Humana Hospital, he tried to escape. (Tr.458). He was captured and placed back in the rear of Himmelsbach's transport van. (Tr.162).

Himmelsbach left Humana Hospital with the Plaintiff in the back of his van at 1:53 a.m. (Tr.165, 213). The Plaintiff was not fighting in the van, nor did he have any physical injuries when he was placed in the van at Humana Hospital. (Tr. 165). According to Dr. Llemalas, the emergency room physician, the plaintiff "was handcuffed behind his back and had leg restraints on..." when he left the hospital. (Tr.527).

The Defendants' Version of the Events

After Himmelsbach left with the Plaintiff, Mattino went back into the hospital to complete the paperwork necessary to book the Plaintiff into the jail. (Tr.166). A few minutes later Mattino received a radio call from Himmelsbach, stating that the Plaintiff was kicking the back door of the van. (Tr.166). Mattino left the emergency room, and got into his car. (Tr.167). Somewhere between the 45th Street exit and the Palm Beach Lakes exit on southbound I-95, Mattino caught up with Himmelsbach. (Tr.169). When Mattino arrived where Himmelsbach had stopped, the Plaintiff was inside the van, with the van doors closed. (Tr.170).

Mattino and Himmelsbach then opened the van doors in order to put leg restraints on the Plaintiff. (Tr.172). The Plaintiff was not kicking the van doors when Mattino and Himmelsbach walked up to the van. (Tr.172). Mattino said that he and Himmelsbach intended to put the leg restraints on the Plaintiff in a "three point restraint system" called "hog tying." (Tr.174-175).

When the Plaintiff refused to come out of the van Mattino and Himmelsbach grabbed the Plaintiff's legs and dragged the Plaintiff out of the van. (Tr.179). While the Plaintiff was on the ground, Mattino placed the leg restraints on the Plaintiff, (Tr.179), in the three-point restraint system. (Tr.181, 262). Mattino said that the Plaintiff did not have a broken leg at the time he placed the leg restraints on the Plaintiff. (Tr.180). Himmelsbach also said that the

Plaintiff did not have any injuries after the Plaintiff had been "hog tied" and placed back in the van. (Tr. 263). Mattino did see a cut on the Plaintiff's face which was bleeding. (Tr.181-182).

Grant then came to the scene, (Tr.184, 267). After Grant arrived, he, Mattino and Himmelsbach all left the scene to go back to Humana Hospital. (Tr.187).

The Plaintiff's Version of the Events

The Plaintiff's testimony was consistent with the Defendants' testimony until the point where he left Humana Hospital at 1:53 a.m. on July 30, 1990, with one important exception. The Plaintiff testified, consistent with Mr. Santiago and Dr. Llemalas, that he was in leg irons when he left the hospital at 1:53 a.m. (Tr.682-683).

Upon leaving Humana hospital after the first incident, the Plaintiff testified that he was placed in the same van in which he was brought to the hospital. (Tr.684). The van made several turns, then ran over some bumps and made a u-turn and stopped. (Tr.685). The Plaintiff at this point was scared, because he knew that he was not at the jail. (Tr.685). The Plaintiff said that the drive from the hospital to the place where they stopped was only a couple of minutes. (Tr.689). Two deputies opened the doors of the van and dragged the Plaintiff out of the van. (Tr.685). The deputies were Himmelsbach and Mattino. (Tr.686). They grabbed the Plaintiff and carried him over to an area where there were parking bumpers, some trees, a chain link fence and a brick building. (Tr.686-687).[1]

The Plaintiff was placed face down on the ground. Either Himmelsbach or Mattino, the Plaintiff was not sure which one, had his knee in the Plaintiff's back as the Plaintiff was lying face down.

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[1]The Plaintiff's story was circumstantially corroborated by one of the Defendants. Himmelsbach admitted that he had previously worked as the director of security for the Days Inn, located next to the 45th Street Exit of I-95. (Tr.278). Himmelsbach said that he was familiar with the structure of the Days Inn. (Tr.279). Thus, if Plaintiff's story were true, Himmelsbach would have been familiar with the parking lot of the Days Inn. This parking lot matched the description of the area where the Plaintiff said his leg was broken. (Tr.854-855).

(Tr.687-688). The other Defendant grabbed the Plaintiff's leg, put it over a parking bumper and jumped on it. (Tr.688). Himmelsbach and Mattino then stood up and started laughing. (Tr.688).

Immediately after his leg was broken, Grant drove up. (Tr.688). Grant got out of his car and said "What the hell is going on?" (Tr.688-689). One of the other Defendants, either Himmelsbach or Mattino, said "[h]e ain't going to run again." (Tr.690). The three Defendants then picked up the Plaintiff and threw him back into the van. (Tr.688).

The Return to the Hospital

Mattino, Himmelsbach and Grant arrived back at Humana Hospital with the Plaintiff seven minutes after they left. (Tr.466, 536)). According to Mr. Santiago, the emergency room technician, the hospital received a telephone call saying that the van was on its way back. (Tr.466). Dr. Llemalas said that there was a call on the radio, and that the caller did not specify why they were bringing the Plaintiff back to the hospital. (Tr.533). Dr. Llemalas testified that the when the Plaintiff returned to the emergency room at 2:00 a.m., "[h]e was restrained in the exact same fashion as he was restrained when he left the emergency department." (Tr.538). Dr. Llemalas specifically testified that the Plaintiff was in leg irons when he returned, the same condition as when he left. (Tr.547).

When Himmelsbach, Mattino and Grant arrived back at the hospital, they were again met by Mr. Santiago. (Tr.468-469). Mr. Santiago testified that the van had two rear doors that opened with a chrome handle in the middle. (Tr.470). When the Defendants returned with the Plaintiff, the Plaintiff had a broken leg. (Tr.189). Mr. Santiago said that the break was an obvious injury. (Tr.502). Dr. Llemalas said that the Plaintiff told him that "they broke my leg." (Tr.541).

After Himmelsbach returned to the hospital, he said that he noticed damage to the van door. (Tr.271). Mattino said that he never saw the Plaintiff kick the back door of the van, nor did anyone ever tell him that the Plaintiff had continued to kick the back door of the van, after the Plaintiff was put into leg restraints.

(Tr.189). Himmelsbach however, testified that the Plaintiff continued to kick the back of the door after being "hog tied." (Tr.270). Himmelsbach took a photograph of the door, and the photograph showed that all of the damage was sustained above the upper hinge on the door. (Tr.271). Grant told Himmelsbach to prepare a damage report for the van. (Tr.276). Grant also filled out information on the damage report. The damage report was filled out by Grant at 1:35 a.m. on July 29, 1990. (Tr.615).

ARGUMENT

This case presents the important questions of whether the Federal Rules of Civil Procedure mean what they say they mean, whether the long-standing collateral source rule should be abandoned in civil rights actions, whether the evidence of intoxication should now be admitted to test the credibility of a witness, and whether directed verdicts should be based on improper pleading requirements. These questions are part of the fabric of many civil rights cases in this country. A shift of such proportions should not be based upon the eleventh circuit's *per curiam* decision in this case.

Under Supreme Court Rule 10, this Court has listed four general areas that would warrant granting a writ of certiorari; if the decision under review conflicts with the decision of another court of appeals, if the decision of a state court conflicts with the decision of another state court on a federal issue, if a court of appeals has decided an important issue not yet decided by this court, or in a way that conflicts with applicable decisions of this Court. However, these reasons are not exhaustive. *C.f.*, *Beahlien v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (Justice White notes that the court has accepted review in important cases, not fitting into any of the three listed categories).

Here, the *per curiam* decision of the eleventh circuit directly conflicts with prior decisions of this court, and with the decisions of other circuit courts. Thus, the decision should be reviewed. Further, this case raises the specter that jury verdicts can be based wholly upon a plaintiff's character, instead of a rational view of the evidence. While it is up to a jury to decide questions of fact, in this

case, the district court's admission of prejudicial evidence suggests that a substantial injustice occurred. This case should be reviewed.

I. The Eleventh Circuit's Affirmance of the District Court's Decision Vacating the Default Conflicts with the Decisions of the First Circuit, the Third Circuit, the Fourth Circuit, and the Fifth Circuit Which Hold that a Default Can Only Be Vacated Upon Good Cause, and Only if Done Within a Reasonable Time, Warranting Review by This Court.

When trial commenced on March 6, 1995, the Defendants were in default, and had been in default since November 21, 1994. During the intervening three and one-half months, the Defendants took no action to vacate the default. On the morning of trial, the trial court vacated that default, without applying any of the requirements of the Federal Rules of Civil Procedure.

The eleventh circuit affirmed the district court's decision. This decision conflicts with the decisions of the first circuit, *Marine National Bank v. F/V Explorer*, 663 F. Supp. 462 (D. Me.), *aff'd*, 833 F.2d 375 (1st Cir. 1987), the third circuit, *Hrizt v. Woma Corp.*, 92 F.R.D. 364 (W.D. Pa. 1981), *remanded for further consideration on other grounds*, 732 F.2d 1178 (3rd Cir. 1984), the fourth circuit, *Park Corp. v. Lexington Insurance Co.*, 812 F.2d 894 (4th Cir. 1987), and the fifth circuit, *Davis v. Safeway Stores, Inc.*, 532 F.2d 489 (5th Cir. 1976) and *Baez v. S.S. Kresge Co.*, 518 F.2d 349 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

In each of these cases, the courts applied the tests under FED. R. CIV. PROC. 55(b)(2), or FED. R. CIV. PROC. 60, that is, that the party seeking to set aside the default, in addition to showing "good cause" or "excusable neglect" must also show that it acted promptly, had a meritorious defense and that setting aside the default would not unduly prejudice the non-moving party. In each case the court concluded that these requirements had not been met, and it was an abuse of discretion to vacate the default. *Hrizt*, 92 F.R.D. at 366-367.[2]; *Davis*, 532 F.2d at 490; *Baez*, 518 F.2d at

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[2]On appeal, the court of appeals agreed with the district court's ruling that the plaintiff had not been prejudiced and that the defendants had a meritorious

350; *Park Corp.*, 812 F.2d at 897. In each of these cases, the court found that the defendants had failed to show "good cause" to vacate the default. Here, of course, there is an absence of *any* cause, good or bad.

.The second part of the test requires that the Defendants take prompt action to vacate the default. Once again, the *per curiam* decision in this case conflicts with the decisions from other circuits. A review of the case law demonstrates that a delay as short as six weeks is not "prompt action." *Marine National Bank*, 663 F. Supp. 462, 466 (D. Me.), *aff'd*, 833 F.2d 375 (1st Cir. 1987) (six-week delay in filing motion to vacate default judgment excessive). Other courts have similarly ruled that relatively short delays in filing a motion to vacate did not constitute "prompt action." *See, e.g., General Contracting & Trading Co. v. Interpole, Inc.*, 899 F.2d 109, 112 (1st Cir. 1990) (three and one-half month delay); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) (two and one half month delay).

The delay in this case was over three months, an excessive delay, especially as the Defendants had notice of the motion for default, had notice of the default, had notice of the Plaintiff's intention to proceed on damages only, and, despite all that notice, took no actions to vacate the default. By affirming the district court, the eleventh circuit is in direct conflict with the decisions from these other circuits.

The proper application of the Federal Rules of Civil Procedure is not some mere academic exercise. Instead, it addresses the fundamental process that should be followed by courts in this country. This Court has cautioned that strict adherence to the Federal Rules of Civil Procedure is necessary to ensure the prompt administration of justice. Dissenting from the denial of certiorari, Chief Justice Rehnquist has warned "[w]ith the vast expansion in the case dockets of all federal courts in recent years, the more settled the procedural system by which these cases are to run the

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defense. However, the court of appeals remanded the matter back to the district court for an express finding that the defendant's failure to answer was the result of inexcusable neglect, rather than mere negligence.

judicial gauntlet, the better off will be litigants, lawyers, and judges." *Yazoo County Industrial Development Corp. v. Suthoff*, 454 U.S. 1157, 1161-1162 (1982) (Rehnquist, J., Dissenting).

This court should accept the petition for certiorari to review the issue of the default.

II. The Improper Admission of Collateral Source Benefits Warrants Review by This Court.

Prior to trial the Defendants represented to the court that they would not seek to introduce evidence of disability benefits received by the Plaintiff. Notwithstanding that representation, the Defendants then introduced, over objection, the fact that the Plaintiff was receiving disability benefits under workers' compensation. This court has previously ruled that such evidence is so inherently prejudicial, admission of the evidence warrants a new trial. Further, every circuit that has considered the issue has prohibited the admission of such evidence. Thus, the decision of the eleventh circuit conflicts with the decisions of the other circuits, warranting review.

A. The Improper Admission of Collateral Source Benefits Violates this Court's Ruling in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963) and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (*per curiam*), *rehearing denied*, 375 U.S. 936 (1963) Which Prohibit the Introduction of Collateral Source Benefits as Inherently Prejudicial.

The Defendants, over objection, and in violation of their agreement prior to trial, introduced evidence of disability benefits received by the Plaintiff. This Court has previously held that it is well-settled federal law that admission of benefits a plaintiff receives from collateral sources is inadmissible, as the evidence "is readily subject to misuse by a jury." *Eichel v. New York Central Railroad*, 375 U.S. 253, 255 (1963). In *Eichel*, 375 U.S. at 255-56 this Court excluded evidence of Railroad Retirement Act benefits, even though the defendant offered them to show plaintiff's motive for staying out of work. 375 U.S. at 255-56. Thus, *Eichel* stands for the proposition that collateral source benefits should be

excluded, regardless of the "theory" under which they are offered into evidence.

The Defendants had agreed, prior to jury selection, that they would not seek to introduce evidence of workers' compensation benefits received by the Plaintiff. (Tr.20-21). Despite this agreement, the Defendants then sought to introduce evidence of the benefits received by the Plaintiff from the workers' compensation injury. Over objection, the district court allowed the testimony. (Tr. 413-414).

After the district court's ruling, the Defendants asked every possible witness whether they knew the amount of the Plaintiff's worker's compensation benefits, including the Plaintiff's expert economist, (Tr. 415-417); a physiatrist, (Tr. 732), the Plaintiff's vocational rehabilitationist, (Tr. 433); .the Defendants' vocational rehabilitationist, (Tr. 783-786, 789), and the Plaintiff (Tr. 843)

The Defendants' closing argument stressed the receipt of these collateral benefits, mentioning the $1,440 monthly worker's compensation benefits. (Tr.890, 892). The Defendants told the jury that "you also heard Sharon Griffen tell you that Mr. Plescher is receiving lifetime workmen's compensation benefits . . ." (Tr.891). The Defendants told the jury that all of the Plaintiff's surgeries had been paid by worker's compensation. (Tr.897).

All of this evidence was irrelevant under FED. R. EVID. 401, and inherently prejudicial under FED. R. EVID. 403. In this case, the district court improperly permitted the Defendants to introduce evidence of disability benefits received by the Plaintiff. This testimony, by its very nature, violated the collateral source rule. Further, this was not harmless error. This Court has held that introducing evidence of collateral benefits is reversible error, even if the jury returns a "no liability" verdict, because of the potential for misuse of evidence of collateral benefits. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 36, *(per curiam)*, *rehearing denied*, 375 U.S. 936 (1963) (evidence of benefits under Longshore and Harbor Workers' Compensation Act too prejudicial and thus excluded). Because the eleventh circuit's decision allowing the admission of collateral source evidence conflicts with this Court's decisions in *Eichel* and *Tipton*, this Court should review that decision.

B. The Eleventh Circuit's Decision Allowing the Admission of Collateral Source Benefits Conflicts With the Decisions of the Second, Fifth, Sixth, Eighth and Tenth Circuits Which Prohibit the Introduction of Collateral Source Evidence.

Following this Court's decisions in *Eichel* and *Tipton*, courts have "vigorously [applied] the collateral source rule to prohibit evidence regarding workmen's compensation benefits." *Southern v. Plumb Tools*, 696 F.2d 1321, 1323 (11th Cir. 1983) (*per curiam*). The federal collateral source rule applies to §1983 actions. *Perry v. Larson*, 794 F.2d 279, 285 (7th Cir. 1986). Under this rule, workers' compensation benefits are subject to the collateral source rule. *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1480 (6th Cir. 1990). Further, the evidence is prejudicial even if the defendant proffers a reason for its admission, other than for damages. Even an argument by counsel that the plaintiff in a tort suit will receive workers' compensation is improper and prejudicial because it may adversely affect the jury's deliberations or violate the collateral source rule. *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523, *rehearing denied*, 788 F.2d 250 (5th Cir.), *cert. denied*, 479 U.S. 883 (1986).

Thus, as a matter of federal common law, the collateral source rule bars any evidence of benefits the Plaintiff may have received in this case from outside sources.

Following *Tipton*, courts have held that the prejudice caused by the improper introduction of workers' compensation benefits "would not be limited to the issue of damages and could infect the determination of liability." *Southern*, 696 F.2d at 1323. There, the eleventh circuit held it was reversible error to permit introduction of workers' compensation benefits, even though the jury returned a defense verdict. 696 F.2d at 1324.

Courts from every other circuit that has considered the issue have similarly ruled that the introduction of worker's compensation benefits is reversible error, even if the jury returns a verdict of no liability. *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 821-22 (5th Cir. 1965). As the *Page* court stated, "[w]ith the whole result in our case being the enigma wrapped in the mystery of a general verdict concealing forevermore the use or uses to which

the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless." 349 F.2d at 821.

Similarly, in *Wilcox v. Clinchfield Railroad Co.*, 747 F.2d 1059 (6th Cir. 1984), the court followed this court's decisions in *Tipton* and *Eichel*, and ruled that those cases indicated "the strength of the legal rulings which prohibit a defendant from showing collateral benefits which an injured party may have received which might influence a jury adversely determining the issue of liability." 747 at 1061. The *Wilcox* court held that it was reversible error to admit evidence of worker's compensation benefits, even though the jury returned a defense verdict. 747 F.2d at 1061-62.If the Plaintiff is not entitled to a judgment in his favor, he is certainly entitled to a new trial.

The decision in this case also conflicts with the sixth circuit's recent decision in *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1170-71 (6th Cir. 1996). There, the sixth circuit held that worker's compensation benefits are a collateral source, and should not be deducted from backpay in a Title VII case. Similarly, in *Santa Maria v. Metro-North Commuter Railroad*, 81 F.3d 265, 272 (2nd Cir. 1996) the second circuit followed this Court's decision in *Eichel* to exclude evidence of payments made from collateral sources in a FELA case.

In *Moses v. Union Pacific Railroad*, 64 F.3d 413, 416 (8th Cir. 1995), the eighth circuit followed *Tipton*, and held that evidence of collateral benefits should be excluded "because of the danger that the jury may be inclined to find no liability, or to reduce a damage award, when it learns that plaintiff's loss is entirely or partially covered." *See also, Green v. Denver & Rio Grande Western Railroad Co.*, 59 F.3d 1029, 1032-1034 (10th Cir. 1995) (collateral source rule bars evidence of disability payments in FELA case, introduction of that evidence warrants reversal).

III. The Eleventh Circuit's *Per Curiam* Affirming the Admission of Evidence of the Plaintiff's Blood Alcohol Content Conflicts with the Decision of Every Other Circuit Considering the Issue, Warranting Review.

Regrettably, the workers' compensation evidence was not the only prejudicial evidence introduced into the trial. The Defendants also introduced, without foundation, evidence of the Plaintiff's intoxication. This evidence was inadmissible under the decision of every other circuit that has considered the issue. The conflict between the eleventh circuit's decision in this case, and the other circuits, warrants review by this Court. Further, in a different context, this Court recently viewed evidence of intoxication with a jaundiced eye in *Montana v. Egelhoff*, ___ U.S. ___, 116 S.Ct. 2013 (1996). In *Egelhoff*, this court rejected a claim by a defendant that he should have been permitted to introduce evidence of intoxication. While this case presents the issue of intoxication in a different context, some of the issue present in *Egelhoff*, including diversion from the main facts, are present here.

At several points during the trial, the Defendants implied that the Plaintiff was a chronic alcoholic. The Plaintiff had moved, *in limine*, for an order prohibiting such evidence. This motion was denied. However, the court erred in allowing such evidence in this case.

The Defendants started the intoxication theme early in the case, beginning in opening argument. In opening statement, the Defendants told the jury that one of the witnesses, Dr. Llemalas, would testify that the Plaintiff "reeked of alcohol." (Tr.90). The Defendants then immediately followed up that statement by telling the jury that the Plaintiff's blood alcohol level was "in the neighborhood of .3, almost 4 times the legal limit." (Tr.90). The Defendants continued the theme by telling the jury in opening statement that the hospital staff, including "nurse Kruer, who drew the blood alcohol level" would tell the jury how the Plaintiff acted at the hospital. (Tr.92). The Defendant returned to the intoxication theme again by stating that after the Plaintiff returned to the hospital for a second time, he had a blood alcohol taken "which shows a .30 blood alcohol level which as I indicated earlier is

almost four time the legal limit." (Tr.101). The Defendants then told the jury that they would call a toxicologist, Tom Carroll,

> who will come in and tell you that someone with that blood alcohol level, that high a blood alcohol level is indicative of somebody who has a chronic alcoholic problem and his tolerance builds up over the years due to alcoholism, you need more and more alcohol to get intoxicated.
>
> Mr. Carroll will also talk about the anesthesia effect that amount of alcohol has on an individual. Mr. Carroll will also talk about the fact that because he was a chronic alcoholic, a .3 blood alcohol level would result in death or coma for most people, but for a chronic alcoholic, they are able to function.

(Tr.102). Neither Nurse Kruer, nor Mr. Carroll ever testified at trial.

The Defendants continued the theme during Himmelsbach's testimony. Counsel asked Himmelsbach whether the Plaintiff had been drinking alcoholic beverages, to which Himmelsbach said that the Plaintiff "wasn't acting the way I would figure a sober person would be." (Tr.287). Then counsel asked Himmelsbach if the Plaintiff was acting like a drunk which elicited the reply "[s]omewhat, yes." (Tr.287). The Defendants asked every occurrence witness whether the Plaintiff was intoxicated. They asked Mr. Santiago, the emergency room technician at Humana Hospital whether the Plaintiff was under the influence of alcohol, to which Mr. Santiago answered "I smelled alcohol on him." (Tr.491). The Defendants then introduced the Plaintiff's medical chart through the testimony of Dr. Llemalas. The Defendants elicited from Dr. Llemalas that the Plaintiff's blood alcohol level was 319.65. (Tr.559). The Defendants specifically asked Dr. Llemalas "[s]o by today's standards he was four times the limit for the state of intoxication in the State of Florida." Dr. Llemalas answered "yes." (Tr. 559).

The Defendants also introduced evidence of intoxication through Dr. Lichtblau, the physiatrist. The Defendants asked if Dr. Lichtblau was able to render an opinion on the effects of a .31 blood alcohol level. (Tr.762). Dr. Lichtblau said the Plaintiff's blood alcohol level was "four times the legal limit." (Tr.763).

The Defendants concluded their case by calling the Plaintiff. Once again, they made intoxication a major theme. They asked how much the Plaintiff had to drink the evening of his arrest. (Tr.815). They asked how many beers the Plaintiff drank earlier in the day, dwelling, at length on this issue. (Tr.816-821). The Defendants then asked the Plaintiff if he "had an awful lot of beers to drink." (Tr.847).

The Defendants made intoxication a key theme in their closing arguments, referring to the Plaintiff as "not the first belligerent antagonistic drunk" that Himmelsbach had ever run "into in his career." (Tr.885).

In this case, all of this evidence should have been excluded as irrelevant under FED. R. EVID. 401, and prejudicial under FED. R. EVID. 403. Evidence of intoxication is extremely prejudicial, especially when it is not directly relevant to any issue in the lawsuit. Every other circuit which has considered the issue has excluded evidence of intoxication under FED. R. EVID. 403, where intoxication did not directly relate to an issue in the case. *See, Hinds v. General Motors Corp.*, 988 F.2d 1039, 1048-49 (10th Cir. 1993) (trial court properly excluded evidence of plaintiff's intoxication in defective seat-belt case, intoxication did not relate directly to any issue in case, and prejudicial impact substantially outweighed probative value); *Dawsey v. Olin Corp.*, 782 F.2d 1254, 1265 (5th Cir. 1986) (evidence of intoxication prejudicial, however, prejudice cured where trial court sustained the objection and immediately issued instruction to jury). This conflict alone warrants review by this court.

Those cases which have permitted evidence of intoxication have recognized its prejudicial impact, but have permitted its introduction, especially if it related to the operation of a motor vehicle that was the genesis of the action. *See, Sajian v. General Motors Corp.*, 916 F.2d 31, 34 (1st Cir. 1990) (relevance of

intoxication of motorist involved in single car accident outweighed its prejudicial impact, where driver error only other explanation for accident); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 246 (1st Cir. 1985) (although evidence of intoxication prejudicial, it was not excluded where it went directly toward plaintiff's contributory negligence in operating motorcycle); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154 (5th Cir. 1981); *Greiner v. Volkswagenwerk Aktiengeselleschaft*, 540 F.2d 85, 88-89 (3rd Cir. 1976). Courts have also allowed evidence of intoxication in cases where the issue was whether the police had probable cause to arrest a civil-rights plaintiff. *Kladis v. Brezek*, 823 F.2d 1014, 1018-19 (7th Cir. 1987); *McKinney v. Galvin*, 701 F.2d 584, 586-87 (6th Cir. 1983). Evidence of intoxication has also been permitted in civil rights cases where the issue was whether an officer's use of force was justified under the circumstances. *Saldino v. Winkler*, 609 F.2d 1211, 1214 (7th Cir. 1979) (issue of plaintiff's intoxication relevant to whether officer justified in using deadly force against plaintiff).

This case presents none of the exceptions to the rule that intoxication evidence should be excluded as prejudicial. This case is not a motor vehicle accident case. This case did not concern the Defendants' "probable cause" to arrest the Plaintiff. The Defendants did not argue that their use of force was reasonable, if the Plaintiff's story that they broke his leg was true. Thus, the evidence of intoxication did not relate directly to any issue in this case. Instead, its only purpose was to unfairly prejudice the jury.

Further, the error in this case was compounded by the Defendants' attempts to argue that the Plaintiff was so intoxicated that his testimony could not be credited. In *Miles v. Ryan*, 338 F. Supp. 1065 (E.D. Pa. 1972), *aff'd*, 484 F.2d 1255 (3rd Cir. 1973), the court rejected a similar attempt to introduce evidence of intoxication. There, as in this case, the proponent of the intoxication evidence argued that consumption of intoxicating beverages was admissible to show that the witness' observation and memory was impaired. The court ruled that evidence of intoxication is usually considered so prejudicial, it should not be admitted. 338 F. Supp. at 1067. There, the court ruled that the evidence was properly excluded, despite the claim that it was relevant to "impaired memory." Here, the Defendants argued

during trial, and at closing argument that the Plaintiff was so drunk that his testimony could not be believed.

In this case, the evidence of intoxication should have been excluded as unfairly prejudicial. The eleventh circuit's decision, allowing the admission of such evidence in conflict with every other court that has considered the issue, should be reviewed.

IV. The Eleventh Circuit's Decision Affirming the Directed Verdict in Favor of the Defendant Grant is Contrary to this Court's Ruling in *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S.Ct. 1160 (1993), and Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review.

The eleventh circuit affirmed the district court's decision directing a verdict for Defendant Grant at the close of the Plaintiff's case. The district court's reasoning was that the amended complaint did not contain an allegation that Defendant Grant covered-up the excessive force of Defendants Himmelsbach and Mattino. (Tr.702). However, the district court was wrong. Under this court's decision in *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S.Ct. 1160 (1993), the Amended Complaint sufficiently alleged a cover-up by Grant. Further, the facts adduced at trial, when viewed in the light most favorable to the Plaintiff, could have sustained a jury verdict against Grant. Thus, the decision of the eleventh circuit in this case conflicts with the decisions of the second, fourth, fifth, seventh and eighth circuits, warranting review.

A. The Eleventh Circuit's Decision Imposes An Impermissible Pleading Standard and Conflicts with This Court's Decision in *Leatherman v. Tarrant County* Warranting Review

The Amended Complaint alleges that Defendant Grant arrived contemporaneously with Defendants Himmelsbach and Mattino breaking the Plaintiff's leg over the parking bumper. (R.93, ¶¶27, 28). The Amended Complaint alleges that the Defendant Grant was acting under color of state law. (R.93, ¶56). Further, the Amended Complaint specifically alleges that Grant "sanctioned, ratified, authorized or otherwise covered up" the actions of his subordinates" and "assisted the co-defendants in covering up the

cause of plaintiff's injuries, undertaking no investigation in determining the cause of plaintiff's injuries and/or alternatively supporting co-defendants' allegation that plaintiff's injuries were self-inflicted." (R.93, ¶62). Thus, the Amended Complaint specifically alleges that Defendant Grant assisted Defendants Himmelsbach and Mattino in covering-up the true cause of the Plaintiff's injuries.

The district court's decision that these allegations did not allege a cover-up was contrary to this Court's decision in *Leatherman v. Tarrant County*. Under this Court's holding in *Leatherman*, there is no "heightened" pleading requirements for §1983 claims. 113 S.Ct. at 1162. Thus, a complaint is valid under §1983 as long as it alleges two elements; first, that the plaintiff has been deprived of a federal right, and second that the person or persons who deprived him of that right acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The amended complaint met both of these tests as to Defendant Grant.

The conflict between the district court's ruling, affirmed by the eleventh circuit, and this Court's holding in *Leatherman*, warrants review.

B. The Decision of the Eleventh Circuit, Affirming the Directed Verdict in Favor of Grant, is Contrary to the Decisions of the Second, Fourth, Fifth, Seventh and Eighth Circuits, Warranting Review.

Further, the eleventh circuit's decision affirming the district court is in conflict with the decisions of the second, fourth, fifth, seventh and eighth circuits, who have all held that it is improper to direct a verdict in favor of a defendant in similar circumstances.

In this case there were sufficient facts for the jury to find liability against Grant. The Plaintiff's testimony was that Grant pulled up immediately after Mattino and Himmelsbach broke the Plaintiff's leg. (Tr.688). The Plaintiff was still lying on the ground when Grant pulled up. (Tr.688). The Plaintiff specifically identified Grant as the officer who pulled up as he was lying on the ground. (Tr.689). Thus, the Plaintiff's testimony puts Grant at the

scene immediately after Himmelsbach and Mattino broke the Plaintiff's leg.

At this point, it was a jury question whether Grant was on the scene in time to prevent Himmelsbach's and Mattino's use of excessive force against the Plaintiff. Every other circuit has held that these facts present a jury question. *See, Jackson v. Pantazes*, 810 F.2d 426, 430 (4th Cir. 1987) (question of fact whether police officer could have prevented excessive force by bail bondsman, thus, district court erred in granting defendants' motions for summary judgment); *Gagnon v. Ball*, 696 F.2d 17, 21 (2nd Cir. 1982) (officer who failed to prevent arrest, and who actively participated in the arrest presented jury question on officer's liability under §1983); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983) (directed verdict for non-participating officer reversed, where officer took no steps to prevent beating); *Putman v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981) (directed verdict for non-participating officer reversed, where officer took no steps to prevent beating); *Smith v. Dooley*, 591 F. Supp. 1157, 1169 (W.D. La. 1984), *aff'd*, 778 F.2d 788 (5th Cir. 1985)

A police officer can be liable under 42 U.S.C. §1983, even if his sole role is a participant in a cover-up of another officer's use of excessive force. *Santiago v. Fenton*, 891 F.2d 373, 384 (1st Cir. 1989). In *Santiago*, the court held that the district court erred in directing a verdict in favor of police officers charged with conspiracy to violate the plaintiff's civil rights. The *Santiago* court held that if the jury believed that there was no probable cause for the officers to arrest the plaintiff, and that the officers fabricated their story, the jury could have believed that there was a conspiracy. 891 F.2d at 389.

The *Santiago* case demonstrates that a conspiracy to cover-up should not be resolved on a directed verdict. Similarly, the court in *Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984) reached the same result. *Stone* is particularly applicable to this case. There, the evidence showed that after the plaintiff was injured, the defendants huddled together, conversing among themselves and created official reports containing false information. The court held that this was sufficient to create a jury question as to the liability of

the officers who covered up the original excessive force. 738 F.2d at 900.

Similarly, in this case, the Plaintiff testified that immediately after he felt his leg being broken, he saw headlights arrive at the parking lot, and he heard Grant say "[w]hat the hell is going on." Grant then talked with Mattino and Himmelsbach. Grant then prepared property damage reports consistent with Himmelsbach's version of the events. If this testimony were true, then this would show that Grant conspired with Himmelsbach and Mattino to cover up their use of excessive force against the Plaintiff. Thus, in this case, it was error to direct a verdict in favor of Grant.

The *per curiam* decision in this case ignores this body of case law. The conflict between the eleventh circuit's decision and the decisions of these other circuits warrants review by this court.

CONCLUSION

It is a fundamental principal that trials should be conducted on the evidence, not on prejudice engendered by improper evidence. The decision in this case based upon that prejudicial evidence so far conflicts with decisions of this Court and other circuit courts that it should be reviewed.

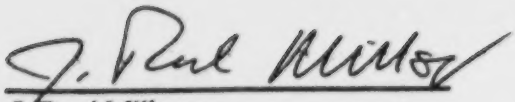
Similarly, the need for an ordered system of justice, based upon a uniform application of the Federal Rules of Civil Procedure, requires review by this court.

Finally, the directed verdict in this case was so contrary to the decisions of other circuits that it must be reviewed.

For all of these reasons, the Petitioner prays that this Court grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

John W. Carroll



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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4764
Non-Argument Calendar

D. C. Docket NO. 93-8460-CIV-KLR

TERRY P. PLESCHER,

Plaintiff-Appellant

JILL PLESCHER, his wife,

Plaintiff,

versus

RICHARD P. WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office, RONALD T. MATTINO, JR., EDWARD F. HIMMELSBACH, GLEN M. GARFIELD, individually and in his official capacity as Deputy Sheriff of the Palm Beach County Sheriff's Office, DAVID M. GRANT, individually, and his official capacity as Deputy Sheriff of the Palm Beach County Sheriff's Office,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 10, 1996)

Before KRAVITCH, ANDERSON, and BIRCH, Circuit Judges.
PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: June 10, 1996
For the court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 7/18/96

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[1] 11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the records as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is support by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precendential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8460-CIV-RYSKAMP

TERRY PLESCHER,

Plaintiff,

vs.

RICHARD WILLE, in his individual and official capacities as Sheriff o the PALM BEACH COUNTY SHERIFF'S OFFICE, RONALD TO. MATTINO, JR., EDWARD F. HIMMELSBACH, GLEN M. GARFIELD and DAVID M. GRANT individually, and in their official capacities as Deputy Sheriff's of the PALM BEACH COUNTY SHERIFF'S OFFICE

Defendants. /

ORDER DENYING PLAINTIFF'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

THIS CAUSE came before the court upon the motion of the plaintiff for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The defendant has filed a response in opposition.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the motion of the plaintiff for a

judgment notwithstanding the verdict or, in the alternative, for a new trial is hereby DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 21 day of April, 1995.

/s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:

Scott S. Warburton
John W. Carroll

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-8460-CIV-RYSKAMP

TERRY PLESCHER,

Plaintiff,

vs.

RICHARD WILLE, in his individual and official capacities as Sheriff o the PALM BEACH COUNTY SHERIFF'S OFFICE, RONALD TO. MATTINO, JR., EDWARD F. HIMMELSBACH, GLEN M. GARFIELD and DAVID M. GRANT individually, and in their official capacities as Deputy Sheriff's of the PALM BEACH COUNTY SHERIFF'S OFFICE

Defendants. /

FINAL JUDGMENT
(COUNTS I-V ONLY)

THIS action came on for trial before the court and a jury, Honorable Kenneth L. Ryskamp, District Court Judge, presiding and the issues having been duly tried, and the jury having duly rendered a verdict in favor of the defendants Mattino and Himmelsbach.

Final Judgement [sic] is hereby entered for defendants Ronald T. Mattino, Jr., and Edward F. Himmelsbach, and against plaintiff as to counts I - V of the amended complaint.

The court having granted a motion for directed verdict for the

defendant David M. Grant, Final Judgment is hereby entered for the defendant as to counts I - V of the amended complaint.

For the reasons stated in open court, Final Judgment is hereby entered for the defendant Richard Wille, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office as to counts I-V of the amended complaint..

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 19 day of May, 1995.

/s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:

Scott S. Warburton
John W. Carroll

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

No. 96-807

In The

Supreme Court of the United States

October Term, 1996

TERRY P. PLESCHER,

Petitioner,

vs.

RICHARD WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office; RONALD T. MATTINO, JR.; EDWARD F. HIMMELSBACH; GLEN M. GARFIELD and DAVID M. GRANT individually and in their official capacities as Deputies Sheriff of the PALM BEACH COUNTY SHERIFF'S OFFICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

In their Brief in Opposition, Respondents, RICHARD WILLE, in his individual and official capacities as Sheriff of the Palm Beach County Sheriff's Office; RONALD T. MATTINO, JR.; EDWARD F. HIMMELSBACH; GLEN M. GARFIELD and DAVID M. GRANT individually and in their official capacities as Deputies Sheriff of the Palm Beach County Sheriff's Office, (hereinafter "Defendants") cites to the transcript of trial as follows: T. (Volume)-(Page #).

Additionally, throughout their Brief in Opposition, Defendants refer to the Petitioner, TERRY PLESCHER, as either "Plaintiff" or "PLESCHER" and cites to the Petition for Writ of Certiorari as follows: P. (Page).

STATEMENT OF THE CASE AND FACTS

i) Course of Proceedings and Disposition in the Courts.

The Plaintiff originally sued Defendants for alleged violations of Plaintiff's constitutional rights, and for state law claims of assault, battery and negligence.

Defendants removed the action to the United States District Court for the Southern District of Florida. (R. 1).

On September 16, 1994, the Plaintiff's Motion for Leave to Amend the original Complaint was granted. (R. 90). The Plaintiff filed the Amended Complaint on October 20, 1994. (R. 93).

The Plaintiff, who knew full well the Defendants were represented by counsel, as the case had been in litigation for well over a year, hand delivered a Motion for Default to the Clerk of the Court as to all Defendants on November 18, 1994, stating that Defendants failed to

file any papers as required by law (R. 98). Defendants immediately filed a response to the Notice for Default and their Answer and Affirmative Defenses on November 21, 1994, to the Amended Complaint (R. 99, R. 100). The Clerk of Court denied the Plaintiff's Motion for Default on November 24, 1994, knowing that Defendants had filed their Answer on November 21, 1994. (R. 102).

On February 27, 1995, the District Court set the matter for trial at a special trial setting. (R. 121). Trial was to commence March 6, 1995 (R. 121). On March 2, 1995, Plaintiff filed a Motion for Entry of Judgment, and to limit Presentation of Evidence to Issues of Compensatory and Punitive Damages. (R. 122).

The parties tried this action before the Honorable Kenneth Ryskamp, United States District Court Judge, Southern District of Florida, and a jury, from March 6, 1995 through March 14, 1995. At the close of the Plaintiff's case in chief, a Motion for Directed Verdict was made on behalf of Defendant GRANT. The Court granted this Motion as to Defendant GRANT. (Tr. 704). On March 14, 1995, the jury returned a verdict for the Defendants. (Tr. 931).

Plaintiff appealed to United States Court of Appeals for the Eleventh Circuit. In a one sentence, PER CURIAM opinion, Eleventh Circuit affirmed, citing to Eleventh Cir. R. 36-1.[1]

Prior to Trial, Plaintiff filed a number of Motions in Limine, one relating to the evidence of the Plaintiff's blood alcohol content, (R. 138) and one restricting the introduction of Workers' Compensation benefits received

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[1] The Court of Appeals Per Curiam opinion is reprinted by Petitioner at Appendix, A-1 of the Petition.

by Plaintiff, alleging that Workers' Compensation benefits were a collateral source (R. 118).

The Court properly denied the Plaintiff's Motion in Limine to exclude evidence of the Plaintiff's blood alcohol content because it is extremely relevant in regards to the Plaintiff's conduct, and Plaintiff's counsel agreed on that issue, stating that "on that issue the degree of Plaintiff's intoxication may be relevant because it may show something about his conduct". (Tr. 17). The District Court denied Plaintiff's Motion in Limine to bar blood alcohol evidence (Tr. 17).

The second motion asked the District Court to bar the introduction of Workers' Compensation evidence, alleging that it was a collateral source. (R. 118). The Court agreed at that point, that while the fact that the previous injury may come in, benefits received from Workers' Compensation should be excluded. (Tr. 20).

ii) Statement of the Facts.

The case tried at the District Court level was a very simple one. Plaintiff claims that Defendants intentionally broke his leg in half on a parking bumper. The Defendants denied that this occurred and the eight person jury concurred with this finding. (Tr. 931). It is also the recounting of the events in the night in question that makes the evidence of the Plaintiff's blood alcohol level so critical.

On the evening of July 20, 1990, Defendant MATTINO, was working a zone in which the Plaintiff resided. He received a call on his radio to respond to a battery and shooting. (Tr. 120-121). Because this was a "shots fired" called, Defendant GRANT, the Sergeant on duty,

responded to the home of the Plaintiff because he was in charge of shift. (Tr. 136).

Defendant GARFIELD, who was voluntarily dismissed from the case by Plaintiff after he testified (Tr. 147) witnessed Plaintiff screaming and hollering from the inside of his residence, whistling, ranting and raving. Plaintiff was upset with channel 5, "as well as all kinds of off the wall stuff" (Tr. 137). Defendant GRANT approached Plaintiff, telling him to put his hands where he could see them. Plaintiff's response to Defendant GRANT's orders, a uniformed deputy, was to "get the fuck out of my yard. You've got no business here". (Tr. 139).

As a result of the Plaintiff's failure to comply with uniformed Deputy Sheriffs' orders, Defendant GARFIELD grabbed the arms of the Plaintiff and because of the Plaintiff's resistance, Defendant MATTINO and Defendant GRANT assisted in bringing Plaintiff to the ground in order to handcuff him. Even while lying on the ground, Plaintiff continued to disobey direct commands from the Deputy Sheriffs. Eventually, the Defendants were able to get control of the Plaintiff and handcuff him. (Tr. 140-141).

Defendants learned from Plaintiff's wife that Plaintiff had recently had back surgery. A transport van, operated by Defendant HIMMELSBACH, was called to the scene (Tr. 126). Plaintiff was placed in the rear of the van and taken to Humana Hospital for medical clearance (Tr. 207).

The emergency room physician stated that the Plaintiff was quite hostile, violent and a threatening patient. (Tr. 513). In fact, upon direct questioning by Plaintiff's counsel, Dr. Lamelas, the emergency room physician, told

Plaintiff's counsel that his client appeared to be quite intoxicated and hostile. (Tr. 512).

It was after this examination was concluded by Dr. Lamelas that Plaintiff attempted to strike Mr. Santiago, an emergency room technician, and tried to run out of the emergency room, down a hallway. This resulted in Mr. Santiago pursuing, tackling and recapturing the Plaintiff and escorting him out to the Palm Beach County Sheriff's Office van (Tr. 519-520).

Defendant HIMMELSBACH left Humana Hospital with the Plaintiff in the back of his van. The computer system of the hospital occasionally shuts down at that late hour, causing problems in the time at the top of chart, thus resulting in approximate discharge times at the bottom of the medical charts for arrival and departure times from the hospital of the Plaintiff. (Tr. 581).

According to Dr. Lamelas, he was of the opinion that Plaintiff was in leg restraints upon his initial departure from Humana Hospital. Mr. Santiago testified that the Plaintiff was handcuffed only, with no leg restraints. (Tr. 497). Plaintiff himself does not even recall if he was in leg restraints or not upon his initial departure from Humana Hospital (Tr. 825).

iii) Defendants' Version of Events Subsequent to Departing Humana Hospital on The First Occasion and Returning to Humana Hospital

A vast disparity exists as to the sequence of events that occurred subsequent to Plaintiff departing Humana Hospital in the transport van.

While in route to the Palm Beach County Jail from Humana Hospital, Defendant MATTINO received a call from Defendant HIMMELSBACH stating that the Plaintiff

was kicking out the back of the van door (Tr. 166). The Plaintiff was kicking the van door, kicking the sides and cussing and raving from the time of the departure from Humana Hospital until he began to enter the roadway at interstate I-95. This was what prompted Defendant HIMMELSBACH to radio Defendant MATTINO and state to Defendant MATTINO, that "this man is kicking out the van doors". (Tr. 219).

Upon arrival, Defendant HIMMELSBACH showed Defendant MATTINO the damage to the van. (Tr. 172). Defendant MATTINO approached the van door in order to take the Plaintiff out of the van and apply leg restraints in order to keep the Plaintiff from kicking the van door any further. (Tr. 172).

Upon opening the van door, Defendant MATTINO asked Plaintiff to come out of the van, to which he refused. Plaintiff then attempted to kick Defendant MATTINO. Eventually, even though Plaintiff was twisting and kicking, Defendant MATTINO was able to get Plaintiff out of the van which resulted in the Plaintiff and Defendants falling to the ground. It was at this point in time that Defendant MATTINO was able to place leg restraints upon the Plaintiff (Tr. 179). Defendant MATTINO said that the Plaintiff did not have a broken leg at the time he placed the leg restraints on Plaintiff (Tr. 180). Also, Defendant HIMMELSBACH said that Plaintiff did not have any injuries after having been restrained and being placed back in the van (Tr. 263). Defendant MATTINO did notice a cut on Plaintiff's face which was bleeding. This is the sole reason why a decision was made to return Plaintiff back to Humana Hospital for medical clearance (Tr. 181-182). Eventually Defendant GRANT arrived at the scene. Defendant MATTINO had called Defendant

GRANT to come to the scene because of injuries sustained to the Plaintiff's forehead (Tr. 183). Upon arriving at the scene, Defendant MATTINO advised Defendant GRANT of the damage to the vehicle and that Plaintiff had to be taken back to Humana Hospital for medical treatment as a result of the cut to Plaintiff's head. Upon arrival and the scene, Plaintiff was already back inside the van. Defendant GRANT did not see the Plaintiff, but did notice the damage to the van. Defendant GRANT also did not know that the Plaintiff had a broken leg at the time. (Tr. 609).

Upon arriving back at Humana Hospital, the Plaintiff does not tell the attending medical providers that any of the Deputy Sheriffs placed his leg on a parking bumper and jumped on it and broke it in half. (Tr. 584). Once again, emergency room technical Santiago becomes involved in the instant matter, and observes the structural damage done to the transport van (Tr. 499). It is also emergency room technician Santiago who notices that Plaintiff's leg was broken.

The Defendants' causation expert, Dr. Craig Lichtblau, opined that the injury Plaintiff sustained was a rotational torque type injury. Dr. Lichtblau's opinion was that the Plaintiff broke his leg during the altercation with the Defendants on I-95, but the fracture became displaced as Plaintiff continued to thrash around in the back of the transport van (Tr. 759-762).

iv) Plaintiff's Version of Events Subsequent to Departing Humana Hospital on the First Occasion and Returning to Humana Hospital

Plaintiff's entire case hinged on the testimony of the Plaintiff, who in essence alleges he was taken to a clandestine area, his leg was put over a parking bumper and his leg was broken in half by two members of the Palm Beach County Sheriff's Office. (Tr. 686-687). The inebriated state of the Plaintiff is critical as to the facts and circumstances leading up to the injury sustained by the Plaintiff.

Plaintiff testified at trial that he was restrained with leg restraints when he first departed Humana Hospital. (Tr. 683). Yet, in his deposition, he didn't recall whether or not he had leg restraints on. (Tr. 825).

Plaintiff testified that after being placed in the transport van, the van made several turns, ran over some bumps, made a U-turn and stopped. (Tr. 685). Of course, it was not until one week before the trial that Plaintiff was able to "rediscover" the clandestine area (Tr. 846). Plaintiff testified that the drive from the hospital to this area took only a few minutes time. (Tr. 689). It was ironic the precision to which Plaintiff testified some three years after the incident as to "where he was driven".

In referring to Defendants HIMMELSBACH and MATTINO, Plaintiff testified that they just grabbed him by his ankles, spun him around, carried him over to an area where there was some parking bumpers, some trees, and a chain link fence, and put his leg over a parking bumper and jumped on it. (Tr. 687-689)

It was after this incident occurred that Plaintiff testified that Defendant GRANT arrived at the scene and

yelled "what the hell is going on here" to Defendants HIMMELSBACH and MATTINO. (Tr. 689).

According to Plaintiff, after this elaborate scheme was complete, Defendants returned to Humana Hospital, where the Plaintiff had just departed without a broken leg, where he is again treated by the exact same hospital personnel as on his previous visit.

Eventually, Plaintiff pled to the charge of battery upon Defendant HIMMELSBACH; to battery upon Defendant MATTINO; battery upon a minor; firing and discharging a firearm within city limits; and vandalism and destruction of both county and private property. Plaintiff also pled and paid back TWO HUNDRED DOLLARS ($200.00) of restitution to the Palm Beach County Sheriff's Office for damage that was done to the transport van of the Palm Beach County Sheriff's Department. (Tr. 806-813).

CORRECTION OF MISSTATEMENTS IN PETITION

Rule 15.1, Supreme Court Rules, compels Defendants to address misstatements of fact or law contained in a Petition. The instant Petition contains both patent misrepresentations and misleading omissions. Respondents statement of the case and facts, supra, corrects the misstatements; however, Respondent specifically identifies each misstatement/misrepresentation below.

The Plaintiff is incorrect in asserting that the District Court abused its discretion by vacating the entry of default against the Defendants. The Clerk of Court never entered a default against the Defendants, and moreover denied Plaintiff's Motion for Default. (R. 102).

The sole basis for Plaintiff's issue regarding the default is that Plaintiff argued that Defendants were in

default and did not take action to vacate default. This statement is patently false. The Defendants filed a response to the Appellants Motion for Default along with their Answer on November 21, 1994, which clearly and obviously constitutes action towards vacating the alleged "default" even though no default had been entered. (R. 99-100).

Furthermore, the Plaintiff took numerous affirmative steps on the issue of liability well after the alleged default had been entered. Had the Plaintiff truly believed the default was entered, the Plaintiff certainly would not have filed these Motions, nor waited until four days before trial to file a Motion on limiting evidence to damages only.

The Plaintiff misled the Trial Court by stating that "Defendants are in default right now". (Tr. 4). Based upon the Plaintiff's misrepresentation, the District Court then quickly examined the docket entry number 102 (R. 102), and misconstrued it as an entry of default.

Docket entry number 102 may be somewhat ambiguous on its face because there is a provision that states that the Defendants are not default (sic) and then one states that default is entered. The Defendants never admitted that they did not take any action to vacate the default. This is clear by the filing of Defendants' Response to Plaintiff's Notice for Default that was filed on the day the Motion for Default was received by Defendants when it had been hand delivered by Plaintiff's Counsel to the Clerk of Courts.

Despite Petitioner's suggestion to the contrary, there was no agreement by the Defendants not to introduce the Workers' Compensation benefits. Simply put, the Plaintiff was suing Defendants, alleging that members of the Palm

Beach County Sheriff's Office violated his civil rights by intentionally putting his leg on a parking curb, jumping on it, and breaking the lower right extremity of the Plaintiff. At no time was the Palm Beach County Sheriff's Office "reimbursing" Plaintiff for any of the injuries he sustained to his back as result of an on the job accident. When Plaintiff injured his back in January of 1990, his employer voluntarily accepted his injury as a work related injury. They have never contested the fact that it was work related and he has been receiving Workers' Compensation benefits from that point in time. (Tr. 844). In fact, upon questioning by his own lawyer, Plaintiff stated that "but for his leg injury he would have gone on with his life the best he could, no big deal". (Tr. 854).

The Plaintiff was receiving Workers' Compensation benefits as a result of an entirely separate incident and it was for this work related back injury that the Plaintiff was receiving Workers' Compensation benefits.

Whether or not evidence was introduced regarding payments to Plaintiff as a result of the back injury sustained on the job are not collateral sources, and this issue is not addressed in any of the cases cited in Petitioner's Brief.

Most importantly, during the trial, Dr. Bernard Pettingill, an economist retained by the Plaintiff, testified to the economic losses allegedly sustained by Plaintiff. That report states that on July 29, 1990, Plaintiff, a white male, was involved in an accident resulting in a "permanent and partial disability".

The sole reason that the amount of Workers' Compensation that the Plaintiff was earning was offered into evidence was as a result of the Plaintiff's attempt to commit a fraud upon the jury and have their expert

economist tell the jury that the Plaintiff had a future economic loss of hundreds of thousands of dollars ***solely*** as a result of his leg injury, without telling the jurors that the Appellant was receiving approximately $1,700 a month in Workers' Compensation benefits for his unrelated back injury. This is the only reason why the amount of money that Plaintiff was receiving per month had to be introduced into evidence during the trial. (Tr. 413-414).

Dr. Pettingill was asked by Plaintiff to come and testify as to past earning capacity losses, past medical expense losses, and future economic losses as a result of the Plaintiff's inability to work, with the inappropriate assumption that all of the Plaintiff's damages were as a result of his leg injury. Further, Dr. Pettingill was under the assumption that all of these monies were due and owing to the Plaintiff because he injured his leg and as a result of that was permanently disabled. (Tr. 411-412).

As such, due to the Plaintiff's attempt at deception upon the ladies and gentlemen of the jury, as well as willfully inaccurate and misleading data being provided to their experts prior to the expert's testimony, Defendants were left with no choice but to have Workers' Compensation evidence offered at the trial level.

Clearly it would have been a fraud upon the jury to have Dr. Pettingill testify to the future economic losses of hundreds of thousands of dollars when the reason Plaintiff was not working was not as a result of his leg injury, but as a result of a solely independent injury to his back separate and apart from this cause of action.

Plaintiff has not, because Plaintiff cannot, cite to one single case that precludes the introduction of Workers' Compensation benefits associated with one injury while

the Appellant is suing another tort feasor for a wholly separate injury, because none exists.

In the instant case, the Plaintiff, through his vocational expert, Mr. Feinstein and his economist, Dr. Pettingill, opened the door to the introduction of Workers' Compensation benefits paid to the Plaintiff. Plaintiff presented evidence through these experts that the Appellant was totally disabled and unable to work as a result of his leg injury. This information was false, and the jury clearly needed to know the truth of the prior disability and the compensation associated with that injury.

ARGUMENT

I. The Eleventh Circuit's Affirmance Of The District Court's Decision Regarding The Issue Of Default Is Not In Conflict With Any Other Jurisdiction. The Plaintiff Is Incorrect In Asserting That The District Court Abused Its Discretion By Vacating The Entry Of A Default Against The Defendants.

Assuming arguendo that the District Court Judge believed that the Clerk of Court entered a default against the Defendants, it would not have been an abusive discretion by the District Court to vacate the entry of default because Defendants met their burden in overcoming the default and the District Court believed Plaintiff neglected to follow up on that default. Deference should be given to the Court for their discretionary decision in vacating the entry of default. Whether or not to enter a default is within the sound discretion of the Court. The law does not favor defaults, and any doubts as to whether a party is in default should be cited in favor of the defaulting party. *Marschauser v. Traveler's Indemnity Co.*, 145 F.R.D. 605, (S.D. Fla. 1992), *Lee v. Brotherhood of Maintenance of*

Way Employees, 139 F.R.D. 376 (D. Minn. 1991). The Plaintiff contends that Defendants were in default and did not take action to vacate the default. As discussed above, this is a falsity since the Defendants filed a response to Appellants Motion for Default along with their Answer on November 21, 1994, which would clearly constitute action towards vacating any alleged default, even though no default had been entered. (R. 99), (R. 100).

What is most ironic is that despite the alleged default, the Plaintiff was involved in numerous activities and affirmative steps at the time of trial on the sole issue of liability by filing numerous motions, all filed after the alleged "Notice of Default" filed by the Clerk of Court on November 25, 1994 (R. 102). The pleadings filed by Plaintiff included a Motion for Special Trial Setting; (R. 103) Submitting Exhibit List and Supplements; (R. 104) (R. 105) Fifth Supplemental Response to Defendants' Request for Production; (R. 106) renewed a Motion for Special Trial Setting; (R. 107) Motion for Judicial Notice of Newspaper Articles; (R. 110) Notice of Plaintiff's Intention to Use Summaries Pursuant to Federal Rule Evidence; (R. 112) Notice of Filing Update to Standards for Law Enforcement Agencies; (R. 113) Notice for Judicial Notice; (R. 114) Notice to Produce at Trial; (R. 116) Motion in Limine to Exclude Prior Bad Acts; (R. 117) Motion in Limine to Exclude Evidence of Benefits Received From Collateral Source; (R. 118) Motion in Limine to Preclude the Introduction of Photographs; (R. 119) Motion in Limine to Exclude Evidence That Plaintiff May Recover Attorney's Fees. (R. 120). Had the Plaintiff truly believed that a default was entered, the Plaintiff surely would not have filed these motions nor waited until four days

before trial to file a Motion on Limiting Evidence to Damages Only.

Docket entry number 102 may be somewhat ambiguous on its face because there is a provision that states the Appellees are not default (sic), and then one that states that default is entered. Assuming that the Plaintiff was unsure as to what this document actually meant, he should have investigated the ambiguity, which would have revealed that this was in fact a denial of the Plaintiff's Motion for Default. The District Court appropriately remedied this situation by assuming that the Clerk had entered a default against the Defendants, and vacated the default based upon the Plaintiff's own remission in not seeking a default judgment after obtaining the default. (Tr. 5).

The proper procedure for obtaining a default judgment is articulated in Federal Rule of Civil Procedure 55, none of which was complied with by Plaintiff. It is a two step process that must be followed. First the movant must ask the Clerk for entry of a default, then the movent must ask either the Clerk or the Court for a Judgment by Default. The Clerk's entry of a party's default is merely the official recognition that a party is in default. The entry of a default is a prerequisite for the entry of Judgment upon that default. *Lee v. Brotherhood of Maintenance of Way Employees*, 139 F.R.D. 376 (D. Minn. 1991).

Assuming Plaintiff believed a default was entered, the District Court was correct in ascertaining that the Plaintiff was remiss in not asking for the second step, a hearing on damages only. (Tr. 5). The alleged default was supposedly on November 25, 1994, the Plaintiff took no action until four days before trial (March 25, 1995), when they filed a motion to limit presentation of evidence to

issues of compensatory and punitive damages. (R. 122). Upon receiving this motion, the Defendants responded on the first day of trial, March 6, 1995, that the Plaintiff's motion was inconsequential because the Plaintiff never completed step one of the process, obtaining an entry of default by the Clerk. (Tr. 2-5).

Because the Trial Judge is the person most familiar with the circumstances of the case and is in the best position to evaluate the good faith and credibility of the parties, a reviewing Court will defer to his decision unless it is clearly wrong. *Marziliano v. Heckler*, 728 F. 2d 151 (2d Cir. N.Y. 1984).

Disposition of motions to set aside an entry of default, or a default judgment, lies largely within the discretion of the Trial Judge whose action is not likely to be disturbed by an Appellate Court. *Consolidated Masonry & Fireproofing, Inc. v. Wagman Const. Co.*, 383 F. 2d 249 (4th Cir. VA 1960). Plaintiff has cited a plethora of cases in his Petition laying out the standard for setting aside a Default Judgment and arguing Defendants have not met the standard. Their efforts, however, are futile, because supposing that an entry of default was entered, the Defendants would have only to have met the lesser standard of good cause under *Federal Rule of Civil Procedure* 55, and not the higher standard of *Florida Rule of Civil Procedure* 60.

First and foremost, when the Defendants filed their response to Plaintiff's Notice for Default, it was physically impossible to file it any sooner than on the day that they received the Notice for Default the Plaintiff had conveniently hand delivered to the Clerk for the Southern District, despite knowing that defense counsel was assigned and representing all the named Defendants.

This Motion clearly enumerated that the undersigned received the Plaintiff's Notice for Default on November 21, 1994, the Motion indicated that the case had been going on in litigation since August of 1993, and has included voluminous amounts of discovery.

On September 14, 1994, the Court issued an Order allowing the Plaintiff to file an Amended Complaint, which had made the response to the Amended Complaint due, within the prescribed time period, on October 4, 1994. The Complaint was originally answered by the undersigned, and in fact, Motions to Dismiss had been filed by the undersigned. Had the Plaintiff's counsel contacted the undersigned, certainly an Answer could have been filed as soon as it was brought to the counsel's attention. Clearly, as was evidenced by the pleadings in the underlying case, and the result at trial, the Defendants have a meritorious defense, and denying the Plaintiff's Motion for Default did not result in prejudice to the Plaintiff.

Any reasonable doubt regarding the vacation of a default should be resolved in favor of granting the application and allowing the case to proceed to trial on its merits. Federal Courts have held that in order to establish a mistake, inadvertence, or excusable neglect, the defaulting party must show that: (1) it had a meritorious defence that might have affected the outcome; (2), that granting of the motion would not result in prejudice to the non defaulting party; (3) and a reason existed for failing to reply to the Complaint. *Florida Physicians Insurance v. David Ehlers*, 8 F. 3d 780, (11th Cir. Fla. 1993). With respect to the third element, "technical error or a slight mistake, by a party's attorney should not deprive the party of an opportunity to present the merits of his claim". Clearly,

the filing of this Answer to the Amended Complaint, which was brought to the attention of the undersigned by way of the Plaintiff's Notice of Default, demonstrates the due diligence of the undersigned.

Quite to the contrary alleged by Plaintiff, there was no delay in filing to this Motion of Default of three months, it was more like three minutes before appropriate responses and answers were filed with the Court.

Although addressed in their original Brief to the Eleventh Circuit, and conspicuously dropped in this Writ of Certiorari, Plaintiff claimed that the Court's reasoning for vacating default because an Answer stands over to an Amended Complaint was improper, arguing lacking of cases of supports this proposition. However, in *Martschinske v. Olympic Styles, Inc.*, 628 F. Supp. 231, aff'd 774 F. 2d 1172 (8th Cir. S.D. 1985), the Court permitted Defendants to refile an original Answer as their response to an Amended Complaint when the only change was to alter the prayer for relief from breach of contract to recision. Also, in *ABI Inv. Group v. FDIC*, 860 F. Supp. 911 (D. N.H., 1994), an entry of default was not warranted when Defendant failed to timely file response to the Amended Complaint, where the Amended Complaint and the original Complaint contained identical claims, such as the exact same case in the instant case.

The District Court's decision to vacate the entry of the file was not an abuse of discretion. The District Court's decision does not conflict with any other Circuits, and as such, the Petitioner's request for review should be denied based on Petitioner's first argument.

II. The Admission Of Collateral Source Benefits Does Not Warrant Review By This Court And Does Not Violate Previous Court Rulings.

The Plaintiff cites dozens of cases that in one way or another allude to the fact that the introduction of collateral evidence, whether it be disability payments or workers' compensation benefits, is improper and prejudicial because it may adversely affect the jury's deliberations, or violate the collateral source rule.

The extensive litany of cases cited by the Plaintiff and corresponding analysis fails to understand the critical difference between the instant lawsuit and the collateral source rule. Simply put, Plaintiff was suing Defendants, alleging that members of the Palm Beach County Sheriff's Office violated his civil rights by intentionally putting his leg on a parking curb, jumping on it, and breaking it. At no time was the Palm Beach County Sheriff's Office reimbursing Plaintiff for any of his injuries sustained to his back. The Plaintiff injured his back in January 1990. His employer voluntarily accepted his injury as a work-related injury. They have never contested the fact that it was a work-related injury, and the Plaintiff has been receiving workers' compensation benefits from that point in time (Tr. 844).

The Plaintiff was receiving workers' compensation benefits as a result of an entirely separate incident, and it was for this work-related back injury that the Plaintiff was receiving workers' compensation benefits. The collateral source rule, as defined by Black's Law Dictionary, Fifth Edition, holds that if an injured person receives compensation for his injuries from a source solely independent of the tort feasor, the payment should not be deducted from the damages which he would otherwise

collect from the tort feasor. In other words, the Defendant tort feasor may not benefit from the fact that the Plaintiff has received money from other sources as a result of Defendant's tort, eg., sickness and health insurance.

Without going into specific details of each and every one of the cases cited by Plaintiff, each and every case cited by Plaintiff's Brief involves essentially the situation where an employee or former employee sues either his employer or third party, as a result of *that* injury sustained in that specific incident.

For instance, in *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963), a former employee was suing New York Central Railroad. At the same time, while he was a Plaintiff suing New York Central Railroad, the plaintiff was also receiving disability payments from that defendant. As such, the collateral source rule prohibited evidence leading to the payment of these benefits. It must be stressed that this is not at all similar to the factual scenario in the instant case. The Plaintiff was not suing Blount Construction, his employer at the time of his injuries, for his back injuries. The Plaintiff was suing the Palm Beach County Sheriff's Office for injuries allegedly sustained to his right leg as a result of the actions of the Defendants.

In Plaintiff's cite to *Southern v. Plumb Tools, Div. of O'Ames Corp.*, 696 F. 2d 1321 (11th Cir. ALA 1983), (per curiam) the Plaintiff hurt his eye when metal flew off a hammer. As a result of the eye injury, and while he was receiving workers' compensation benefits for that eye injury, the injured worker sued the manufacturer of the hammer for the eye injury. As was the case with the *Eichel* case, this background is not at all analogous to the instant

lawsuit. Clearly, the *Southern* case is dealing with collateral benefits paid for the eye injury.

It is true that in *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, rehearing denied, 375 U.S. 396 (1963), the Court held that evidence of benefits under The Longshore & Harbor Workers' Compensation Act are too prejudicial and thus excluded. In that case, however, an offshore drill worker sued his employer. At the time of the lawsuit, the employee was receiving workers' compensation benefits from the very same injury that he was suing for. The fundamental problem that Plaintiff continues to miss the issue that payments received by the Plaintiff for his back injury simply are not collateral to the Plaintiff's leg injury that he sued upon. No matter how many cases Plaintiff cites to, it simply will not make those payments collateral. It also cannot be stressed enough that it was attempted fraud upon the Court by Plaintiff's counsel in attempting to tell the ladies and gentlemen of the jury that his client was 100% disabled and suffered corresponding economic losses because of his leg injury that required the admittance of this evidence into the instant case.

Petitioner points out that argument by counsel that Plaintiff in the tort suit was receiving workers' compensation benefits is improper and prejudicial because it may adversely affect the jury's deliberations or violate the collateral source rule, and cites to *Doucet v. Gulf Oil Corp.*, 783 F. 2d 518, rehearing denied 788 F. 2d 250 (5th Cir.), cert. denied, 479 U.S. 883 (1986).

The problem with the Plaintiff's citation to this case is that the Plaintiff was injured while working on an offshore oil rig. There was an argument and a dispute as

to who was the employer of the Plaintiff, either the oil company or a labor services contractor.

The use of the Longshoreman & Harbor Workers Compensation Act evidence was used to explain the borrowed employee rule to the ladies and gentlemen of the jury. Thus, there is absolutely no relevancy whatsoever in the application of the *Doucet* case to the instant cause of action.

It cannot be stressed enough that workers' compensation evidence was introduced regarding the payments being made to Plaintiff as a result of this back injury. As the verdict form indicates (R. 149), as all the testimony pointed throughout the case, the sole issue at trial before the Trial Court was whether or not Defendants violated the civil rights of the Plaintiff by breaking his leg. Plaintiff was not receiving any disability and/or any workers' compensation benefits for this leg injury. As such, workers' compensation benefits paid for Plaintiff's back injury is not a collateral source.

The Plaintiff was trying to recover money damages for his leg injury. Whether or not evidence was introduced regarding payment to Plaintiff on the job back injury are not collateral sources, this issue is not addressed in any of the cases cited in Plaintiff's Petition.

In *Withrow v. Cornwell*, 845 F. Supp. 784 (D. Kan. 1994), the Plaintiff argued that the Court erred in admitting Social Security forms into evidence or by failing to remove references to Social Security before submitting forms to the jury. Plaintiff argued in that case that the Social Security forms were inadmissible evidence of collateral source benefits and that the prejudicial effect of the forms outweighed the probative value.

Approximately two weeks prior to the accident upon which the Plaintiff sued the Defendant, the Plaintiff applied for Social Security disability benefits, claiming that she was totally disabled. As the Court is well aware, the Plaintiff in the instant lawsuit was 100% disabled because of a previous work related injury. Plaintiff told his own economist, Dr. Bernard Pettingill, and his vocational rehabilitation specialist, Mr. Glenn Feinstein, of this erroneous information.

In the *Withrow* case, over Plaintiff's objections, the Court admitted the Social Security application into evidence. While it was admittedly prejudicial to the Plaintiff, the Social Security applications were extremely relevant to the credibility of the Plaintiff's claim that she was not totally disabled until the accident in question. The *Withrow* Court held that the Social Security forms were not evidence of collateral source benefits or properly admitted into evidence.

Even if this Court were inclined to assume arguendo that the payments being received by Plaintiff for his work-related back injury were a collateral source, evidence of collateral source information is admissible in certain situations. The Collateral Source Doctrine does not bar evidence offered to show that the identical payment claimed as loss was in fact paid. Such evidence can be admissible to rebut a claim that a Plaintiff is making as to damages sustained. *Morgan Guaranty Trust Co. v. Garrett Corp.*, 625 F. Supp. 752 (S.D. N.Y. 1986).

Again, assuming arguendo that the workers' compensation benefits are collateral source, which the Respondent disagrees with, the Eighth Circuit has allowed evidence of collateral benefits to impeach a Plaintiff who misleads the jury, which is exactly what

happened in the instant case. *Lang v. Missouri P. R. Co.*, 703 F. 2d 322 (8th Cir. Ark. 1983). The evidence concerning Plaintiff's receipt of workers' compensation benefits is clearly relevant to test the credibility of the Plaintiff's assertion regarding not only his lost wage claim, but also the true cause of his 100% disability. See also *Gladden v. P. Henderson & Co.*, 390 U.S. 1013, 20 L.Ed. 162, 88 S. Ct. 1262 (1968).

As such, there was no error in the introduction of the workers' compensation benefits paid to Plaintiff, there is no conflict with any other District, and as such, the Writ of Certiorari based upon these grounds must be denied.

III. Admission Of Plaintiff's Blood Content Is Not In Conflict With Any Other Districts.

The Petitioner contends that the Defendants introduced, without foundation, evidence of the Plaintiff's intoxication. Unfortunately, the Plaintiff's blood alcohol level was entered into evidence through the testimony of the emergency room physician, Dr. Peter Lamelas, without objection of the Plaintiff's counsel (Tr. 559-560).

The Respondent has no earthly idea why the cite of *Montana v. Egelhoff*, 135 L.Ed. 2d 361, 116 S. Ct. 2013 (1996) would have any relevancy whatsoever in the instant case. *Montana* involved criminal homicide, where the Defendant wanted to introduce evidence of intoxication as to the element of knowingly and purposely as it applies to a criminal homicide case.

The fact that Plaintiff had a .30 blood alcohol level was extremely critical to the instant case, particularly given the divergent stories as to how the Plaintiff's injury occurred to his leg. The Plaintiff's alcoholic condition was addressed by wholly independent witnesses, including

Mr. Santiago, who indicated "I smelled alcohol on him" (Tr. 491), and that Plaintiff's blood alcohol was 319.165 from Dr. Lamelas (Tr. 559).

First and foremost, the blood alcohol of the Plaintiff was introduced into evidence upon cross examination of Dr. Lamelas without objection, and appropriately so, after the District Court denied the Plaintiff's Motion in Limine as to the evidence of blood alcohol (Tr. 560-561). Interestingly, the Plaintiff's counsel himself was actively involved in obtaining from his client upon direct examination, the amount of alcohol that the Plaintiff had consumed. Plaintiff was asked by his own counsel "At what time during the day did you start drinking if you recall" and "During the course of the day, how much did you drink", to which the Plaintiff replied "I couldn't honestly tell you. We drank beer all day long. You know, Saturday afternoon" (Tr. 665).

Despite the fact that the blood alcohol level of the Plaintiff was extremely relevant as to the state of mind of the Plaintiff and his ability to recall the events of the night in question, the Plaintiff is of the position that the evidence should have been excluded as irrelevant under Federal Evidence 401 and prejudicial under Federal Rule of Evidence 403. Again, the Plaintiff had moved this Court in Limine for an Order prohibiting such evidence, which was properly denied.

The Court is afforded wide discretion in determining the admissibility of evidence under the Federal Rules of Evidence. *United States v. Abel*, 469 U.S. 45, 83 L.Ed. 2d 450, 105 S. Ct. 465 (1984). The alcohol level of the Plaintiff was highly probative of not only the state of mind of the Plaintiff in this case, but also as to his credibility. The Plaintiff's testimony during his deposition was that he

had only a glass of wine or two immediately before the incident took place at his residence (Tr. 820). When this case is looked at as a whole, it is essentially a case of the Plaintiff's word versus the Defendant's word. The fact that Plaintiff alleges to have had only a glass of wine or two does not comport to the Plaintiff's outlandish behavior, not only at the site of the arrest, but upon both visits to Humana Hospital. Clearly, the probative value far outweighs its prejudicial effect of this testimony.

Courts have allowed the evidence of intoxication in cases where the issues of whether the police had probable cause to arrest the Plaintiff, and whether an officer's use of force was justified under these circumstances. *Kladis v. Brezek*, 823 F. 2d 1014 (7th Cir. IN. 1987), *McKinney v. Galvin*, 701 F. 2d 584 (6th Cir. Mich. 1983). Petitioner cites numerous cases wherein motor vehicle accident cases allow, and sometimes disallow, blood alcohol content. This case does not concern the Plaintiff's operation of a motor vehicle. However, this case does deal with the state of mind and whether or not Plaintiff can actually recall the night in question. This is the heart of the case, and the intoxicated state of the Plaintiff was highly relative and properly admitted through the hospital records, as testified by Dr. Lamelas. The hospital records containing results of tests concerning the Plaintiff's blood alcohol level immediately after the accident are admissible under the hearsay exception for reports kept in the ordinary course of business. *Andres v. Gilberti*, 592 So. 2d 1250, (Fla. Dist.Ct.App. 4th Dist. 1992) see also *Love v. Garcia*, 611 So. 2d 1270, (Fla.Dist.Ct. App. 4th Dist. 1992).

In the case of *Eschelbach v. William S. Skull Co.*, 293 F. 2d 599 (3rd Cir. N.Y. 1961), the Court held that evidence produced on cross examination of the Plaintiff as to the

extent of his drinking alcoholic beverages during the relevant time period was properly admitted to test the credibility of the Plaintiff suing for personal injuries.

Further, in *Saladino v. Winkler*, 608 F. 2d 1211 (7th Cir. Ill. 1979), evidence as to the intoxication of the Plaintiff at the time of a police shooting was relevant to the issue of reasonableness of his conduct at such time, and the probative value of such evidence was not substantially outweighed by danger of unfair prejudice. The Court held that intoxication evidence tends to make more probable that the Plaintiff acted as the Defendant contended he did.

Plaintiff continues to erroneously rely on the case of *Miles v. Ryan*, 338 F. Supp. 1065 (E.D. PA. 1972), aff'd 484 F. 2d 1255 (3rd Cir. 1973) in his assertion that blood alcohol in the instant case should have been excluded. A complete reading of *Miles*, other than reading the head notes, reveals that the Trial Court disallowed evidence regarding alcohol ingested prior to a car accident, because there was no indication that the Plaintiff could have laid a foundation showing the actual state of intoxication. The *Miles* case is not at all applicable. Predicate was clearly laid in the instant case by the Humana Hospital records as to the Plaintiff's .30 blood alcohol level.

As such, because the Plaintiff's blood alcohol level is so critical to the testimony presented to the jury in this case, because its probative value significantly outweighed its prejudicial effect, and because the Trial Court is given wide latitude as to what evidence is admissible and not admissible, the Trial Court properly allowed blood alcohol content into evidence, and does not warrant review in the instant case.

IV. Eleventh Circuit's Decision Awarding Directed Verdict In Favor Of Defendant GRANT Is Not Contrary To The Court's Ruling In *Leatherman v. Tarrant County*, ___ U.S. ___, 113 S. Ct. 1160 (1993) Nor Contrary To Other Decisions In Other Districts.

Respondent does not dispute that under the Supreme Court's holding in *Leatherman v. Tarrant County*, 113 S. Ct. 1160 (1993), that there is no heightened pleading requirements necessary for a 42 U.S.C. § 1983 claim.

The Amended Complaint of Plaintiff alleges that Defendant GRANT was acting in the color of State law (R. 93, paragraph 56), and that Defendant GRANT sanctions, ratified, authorized, or otherwise covered up the actions of his subordinate co-defendants, specifically, Defendants MATTINO and HIMMELSBACH, by failing to report their actions . . . (R. 93, paragraph 60).

Petitioner cites a whole litany of cases that are inapplicable to the instant case. All of the cases cited address a fact scenario where an officer who was present during the use of excessive force, or knew of the use of excessive force, did nothing to prevent or intervene in this use of force, and therefore was liable under 42 U.S.C. § 1983, were as liable as the actual officer who had partaken in the incident.

No testimony exists that Defendant GRANT had any physical contact whatsoever with Plaintiff subsequent to Plaintiff's departure from his trailer to the time he arrived at Humana Hospital on the second occasion. The only evidence against Defendant GRANT is that he said "what the hell is going on" (Tr. 690). There is absolutely no evidence that Defendant GRANT knew or even had information that Plaintiff's leg was even broken. There is

absolutely no evidence in the record that Defendant GRANT had at his disposal, to ascertain that Defendant HIMMELSBACH and Defendant MATTINO's version of the story was not correct. Even assuming arguendo that Defendant GRANT would have known that Plaintiff's leg was broken, there is absolutely no evidence in the record that he would have known that it was done intentionally. Plaintiff never told Defendant GRANT that Defendant HIMMELSBACH or Defendant MATTINO broke his leg. There is absolutely no evidence in the record that establishes any knowledge Defendant GRANT had on that evening as to Plaintiff's "side of the story". In fact, his very testimony as to "what the hell is going on here" means just that, he had no idea what was going on.

The Plaintiff cites to the case of *Santiago v. Fenton*, 891 F. 2d 373 (1st Cir. Mass. 1989) in his contention that Defendant GRANT can be held liable under 42 U.S. Code Section 1983 because of his role in partaking to conspire to violate the civil rights of the Plaintiff. In *Santiago*, the Court held that a civil rights conspiracy is a "combination of two or more persons acting on concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or an injury upon another in an overt act that results in damages."

To be actionable under Section 1983, the Plaintiff has to prove that "there has been, besides the agreement, an actual deprivation of rights secured by the Constitution and laws." *Earle v. Benoit*, 850 F. 2d 836, 844 (1st Cir. Mass. 1988).

Absolutely no evidence exists that Defendant GRANT met any of the requisite elements for a civil

rights conspiracy. As such, any attempt to analyze the instant case to the *Santiago* case is unfounded.

As such, because the Plaintiff failed to offer into evidence any facts as to liability should be assessed against Defendant GRANT the directed verdict in favor of Defendant GRANT was correct, and not contrary to the holdings in *Leatherman*, nor contrary to other decisions in other Circuits, and as such, review is not warranted.

CONCLUSION

No compelling reasons for review exists in this instant case. The Eleventh Circuit Court of Appeals' per curiam decision found no error and as such, the Writ of Certiorari should be denied.

Respectfully submitted,

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